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IN THE

Supreme Court of the United States

October Term, 1966

No. 582

BERYL H. WEINER,

Petitioner

vs.

FULTON COUNTY AND LEWIS R. SLATON,
Solicitor-General of Fulton County,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF FOR RESPONDENTS IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals of Georgia, is reported at 113 Ga. App. 343, 148 S.E. 2d, 143, decided February 11, 1966. No formal report was made of the denial of the application for certiorari to the Supreme Court of Georgia.

JURISDICTION

Jurisdiction is invoked by the petitioner under the provisions of 28 U.S.C.A. § 1257 (3). Jurisdiction is disputed by the respondents on the grounds that there is no substantial Federal question presented for review. Cf. Rule 19 (1) (a), United States Supreme Court.

QUESTIONS PRESENTED

1. Should a decision of a State Appellate Court be reviewed by the United States Supreme Court on a petition for a writ of certiorari, where the sole Federal issue presented to the lower courts involved a claim that rights were deprived by a state contrary to the Fifth Amendment to the Constitution of the United States, and such Amendment does not apply to actions of the respective states?

STATUTES INVOLVED

United States Constitution, Amendment 5

28 U.S.C.A. §1257 (3).

STATEMENT OF CASE

This originally was a suit brought in the Superior Court of Fulton County, Georgia, by Beryl H. Weiner, against Fulton County and Lewis R. Slaton, as Solicitor-General of Fulton County. In substance, the petition alleged that the petitioner was a duly licensed, practicing attorney at law, and that on August 18, 1965, he had been appointed by the Hon. Stonewall Dyer, a Judge of the Superior Court of Fulton County, to represent three indigent defendants, who had been charged with various criminal offenses under the laws of the State of

Georgia. The petition further alleged that this appointment was without compensation, and that he was entitled to just and adequate compensation for his time and services as an attorney, in that the same were compensable property interests within the meaning of the Fifth Amendment of the Constitution of the United States. (Par. 13 of Petition.) The petition further alleged similar provisions of the Constitution of the State of Georgia, and alleged that the appointment of the petitioner without compensation was violative of certain additional provisions of the Georgia Constitution. The petition concluded with prayers that the Court decree that the appointment of the petitioner was a taking and conscription of his time, which was a compensable property interest, within the meaning of the Constitution of the United States and the State of Georgia. The petition also prayed that further proceedings in the criminal cases be enjoined, and that the petitioner be given a judgment against the defendant Fulton County in the amount of $6,000.00.

Following a hearing on the petition, a general demurrer was sustained, and the petition dismissed by the trial court. The plaintiff appealed this dismissal to the Supreme Court of Georgia, which transferred the appeal to the Court of Appeals of Georgia. This latter Court stated that the case was "originally appealed to the Supreme Court and by that Court transferred to the Court of Appeals, thus eliminating from consideration any constitutional question," and held that the trial court did not err in dismissing the petition upon demurrer. Application for certiorari to the Supreme Court of Georgia was filed by the petitioner, and this was denied. Whereupon, the petitioner filed the instant application for certiorari to the Supreme Court of the United States.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED, AS THE ONLY FEDERAL QUESTION PRESENTED TO THE LOWER COURT WAS NOT SUBSTANTIAL, HAVING BEEN DECIDED ADVERSELY TO THE CONTENTIONS OF THE PETITIONER ON NUMEROUS OCCASIONS.

The petitioner, in his argument concerning the reasons for granting the writ, urges that this case is an ideal vehicle for the United States Supreme Court to use to answer questions which its own decisions have raised. However, an examination of the argument shows that the questions which the petitioner is referring to concern the right of an indigent criminal defendant to *compensated* counsel. It should be noted that this is a right to be asserted by the criminal defendant himself, and not by the counsel. Actually, when the instant case commenced, it was a companion case to a criminal case in which this issue was raised, and the decision of the Court of Appeals of Georgia considered both cases as one. However, there is no petition for a writ of certiorari in the criminal case, and, as a practical matter, there is no necessity for one as the criminal defendant was acquitted on his ultimate trial. It would thus appear that the only issues presented by this petition are those raised on behalf of the petitioner himself, i.e., those raised by an attorney for an attorney, not those raised for the indigent criminal defendants.

It is respectfully submitted that the issues raised by the petitioner in the trial court, and in the appellate courts of Georgia, present no substantial Federal issue, and, hence, this is not a proper case to grant a writ of certiorari.

The statutory basis urged for invoking the jurisdiction of this Court is 28 U.S.C.A. §1257 (3), which provides that "final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) by writ of certiorari, . . . where any title, right, privilege or immunity is *specially set up or claimed* under the Constitution, treaties or statutes of . . . the United States." (Emphasis supplied.)

Judicial interpretation of this section has been to the effect that the Federal right asserted must be presented to the lower court for decision or the case is not subject to review by the United States Supreme Court. "It is not enough that there be somewhere hidden in the record, a question which, if raised, could be of a Federal nature (citations omitted). In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the Constitution or law or treaties of the United States." *Dewey* v. *Des Moines,* 173 U.S. 193, 199, 200; 43 L. Ed. 665, 667 (1899).

It is clear that in order for a right under the Federal Constitution to be "specially set up or claimed" it must be definitely set forth before the lower court for "a claim which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. (Citations omitted.) A point that was never raised cannot be said to have been decided adversely to one who never set it up or in any way alluded to it . . ." *Dewey* v. *Des Moines,* 173 U.S. 193, 199-200; 43 L. Ed. 665, 667 (1899). See also *Central Vermont Rwy. Co.* v. *White, Admx.,* 238 U.S. 507, 59 L. Ed. 1433

(1915); *Bothwell* v. *Buckbee, Mears, Co.*, 275 U.S. 274, 72 L. Ed. 277 (1927); *Northwestern Bell Tel. Co.* v. *Nebraska State Railway Comm.*, 297 U.S. 471, 80 L. Ed. 810 (1936); *Manhattan Life Insurance Company* v. *Cohen*, 234 U.S. 123, 58 L. Ed. 1245 (1914), and *Whitney* v. *California*, 274 U.S. 357, 362, 71 L. Ed. 1095, 1100 (1926).

It is thus apparent that in order to determine what is presented by the instant petition for a writ of certiorari, it is necessary to determine what Federal issues were presented to the lower courts. A careful examination of the petition in the instant case, and other portions of the record, discloses that in only one paragraph of the petition (par. 13) is there any claim made by the petitioner involving Federal Constitutional rights, and this is an allegation of deprivation of right under the Fifth Amendment of the Constitution of the United States. All of the other claims made by the petitioner relate solely to deprivation of rights under the Georgia Constitution. It is particularly noteworthy that nowhere in the petition nor in the decision of the Court of Appeals is any argument made with reference to deprivation of rights under the 14th Amendment to the United States Constitution, and it thus would appear that the effect of this latter Amendment is not presented by the instant petition for certiorari.

With regard to the one Federal Constitutional issue presented, i.e., the rights of the petitioner under the Fifth Amendment to the Constitution of the United States not to have his private property taken for public use without just compensation, it is respectfully submitted that this is a question which has been decided adversely to the contentions of the petitioner on so many

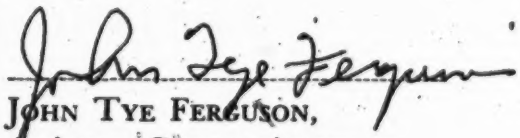
occasions that there is no substantial Federal issue presented. In the case of *Withers* v. *Buckley*, 20 How. 84, 15 L. Ed. 816 (1858), it was specifically held that the mandate of the Fifth Amendment relating to taking of property for public use without just and adequate compensation was a prohibition against the Federal government only, and had no application against action taken by a state. Almost a hundred years after the decision in the *Withers* case, its holding was reaffirmed with reference to other Fifth Amendment rights by Mr. Justice Frankfurter, who stated: "It is plain that the amendment can no more be thought of as restricting action by the states than as restricting the conduct of private citizens." *Knapp* v. *Schweitzer*, 357 U.S. 371, 381, 78 S. Ct. 1302, 2 L. Ed. 2d 1393, 1401 (1958). See also *Martin* v. *Creasy*, 360 U.S. 219, 79 S. Ct. 1034, 3 L. Ed. 2d 1186 (1959), holding that the eminent domain prohibitions of the Fifth Amendment were made applicable to the states only through invocation of the due process clause of the Fourteenth Amendment.

For these reasons it is respectfully submitted that the petitioner having presented no issues involving the Fourteenth Amendment to the United States Constitution to the lower courts, should not now be permitted to assert these rights for the first time in this court. Hence, it is clear that this case does not present a substantial Federal question, and the writ of certiorari should be denied.

CONCLUSION

In concluding, counsel for the respondents would again urge that the writ of certiorari be denied for want of substantial Federal questions. Although there is no disputing the problem presented by forcing attorneys to represent indigent criminal defendants without compensation, this is a problem which should not be resolved by the courts. See *U. S.* v. *Dillon*, 346 F. 2d 633 (C.A. 9th Cir. 1965) *cert. den. Dillon* v. *U. S.* 383 U.S. ——, 86 S. Ct. 550 (1966), and the numerous cases cited therein. Rather, this is a problem which addresses itself to and should be left to the moral conscience of the legislative bodies of the nation, which can and will act in this regard. Cf. Criminal Justice Act of 1964, Public Law Pub. L. 88-455, 78 Stat. 552.

Respectfully submitted,



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PROOF OF SERVICE

I, JOHN TYE FERGUSON, Attorney for the Respondents in the foregoing petition for Writ of Certiorari, and a number of the Bar of the Supreme Court of the United States, hereby certify that on the 19 day of October, 1966, I served a copy of the foregoing Brief In Opposition upon the petitioner herein as follows:

By mailing a copy thereof in a duly addressed envelope, with first class postage prepaid to their Attorney of Record as follows:

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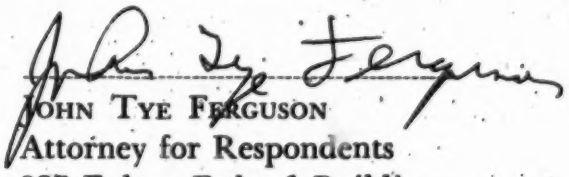

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